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LEGAL EDUCATION AND THE FAILURE OF THE BAR TO PERFORM ITS PUBLIC DUTIES.

Mr. Wm. Draper Lewis in an able address delivered at St. Paul last August, after stating that the function of the legal profession is to administer justice, says:

"Whether at any particular time or in any particular country that particular service is being efficiently performed must be tested by the answer of the facts to three questions. First, are ethical standards of the members of the profession clear and tending to improve? Second, does the law, whether expressed in the development of 'cases' or legislation tend to correspond to the felt sense of right in the community? Third, is the law administered with reasonable certainty and dispatch?"

We have not space to take up what he has to say of the first and second propositions. As to the third, "is the law administered with reasonable certainty and dispatch?" He says of the law both civil and criminal, "our failure to perform the service which the community may of right expect is almost complete." This is a sweeping statement, but unfortunately it is as true as it is sweeping. If it takes from two to four years to get cases tried in our supreme courts after reaching such courts, there is something radically wrong in the administration of the law. The bar is justly held responsible for such a condition and justly gets the distrust of the public for permitting it to exist. Such a condition is ruination to a great deal of good legal business, while affording a refuge to unscrupulous members of the profession. In an English law journal, not long since, we read of a delay in the trial of civil appeals cases of nine months, as being regarded as "scandalous." There is no more excuse for such delays in this country than in England. If an order of things, which is deplored in England by English journals, was brought about in some of our states the people would cry out, "what a magnificent reform!" It would be a good reason for the governors of many of our states setting a day apart for thanksgiving and general rejoicing, and yet what are our governors or our state bar associations doing about the matter more than to grumble a little. Before our government was formed the law's delays were deplored and a protest was made in the declaration of independence and one of the provisions of the *magna charta* was, "justice to be administered without sale, denial or delay." What has the effect been upon this outrageous abuse of government since the United States have a constitution and each separate state also? In the laws of our land is the government itself, for which our bench and bar are most responsible. Is it a wonder that distrust is abroad in the minds of the people when we consider the manner in which our laws are executed? What has the declaration of independence amounted to in this respect? Is not the fact that in some of our states the courts are four years behind in their work a most significant one? A gentleman speaking to the writer recently of a suit brought against him in regard to some real estate, said, "the fact that it took three years to reach a case in the supreme court before a decision could be rendered amounted to blackmail, when some unresponsible person, with any kind of a pretext for a suit, could practically take it out of market, not only for three years, but perhaps a much longer time." In such a case, is it not a serious thing that we have not means to reach such a case at least in nine months, which in England is regarded as a scandalous delay? In the administration of the criminal laws what chance has the poor man as compared with the rich who are able to hire the best legal ability to defend them? And how frequently a criminal escapes through the bare technicalities of the law. Some of our greatest legal minds cry out against the evil of too much law, but what are our bar associations doing to remedy the evil? It is true that in some places there is an awakening and some effort has been put forth. But to be really effective the whole bar of the land should be roused to action to remedy the abuses which are creeping in more and more as the years advance. Is a lawyer fit to belong to a profession and regard none of the duties which he owes to that profession? If the whole bar would awaken to the fact that each member of it owes a duty to his profession, the selecting of the material for the judi-

ciary would be completely in the hands of the lawyers who are best able to judge of the material with which our various benches should be composed. The growing distrust among the masses of our land in its laws and their administration, means that the very foundations of our government are in danger, for it must ever be kept in mind that the due administration of the law is government itself.

Since lawyers are the most conspicuous and trusted of leaders and teachers, those who really discharge their public functions are the ones who are throwing radiant splendors over the profession. Those who refuse to discharge their public functions are narrow visioned, selfish, and are the ones who are responsible for the constantly increasing distrust which is growing in the public mind. The fact is that the legal profession, as a whole, is selfish and slow and it is no wonder that it is losing ground in public esteem. It needs to be stirred up from the foundations and put face to face with the fact that it has duties to perform, debts to be paid to the profession, and we all need to ask ourselves if we have paid the debt. Many a lawyer who is elected to the legislature or to congress or any great office, gets the idea that the public owes him a debt of gratitude. The public will recognize the debt when it sees that such a lawyer is paying the debt he owes the public for the confidence it has bestowed. When such an one with unselfish devotion advances the public weal, the public will generously and enthusiastically respond. We have had too many failures, and this Mr. Lewis attests when he says "our failure to perform the service is almost complete."

NOTES OF IMPORTANT DECISIONS.

ENFORCEMENT OF FREIGHT CHARGES BY A SALE OF GOODS CAN NOT BE LEGALLY EFFECTED WITHOUT GIVING CONSIGNOR NOTICE WHEN.—An interesting question is considered by the Supreme Court of Georgia in the recent case of Southern Ry. Co. v. Born Steel Range Co., 55 S. E. Rep. 173.

The case was decided by the court on an agreed state of facts, which sufficiently appear in the opinion, which was as follows: "It affirmatively appears that the defendant railway duly performed its duty as a common carrier to safely transport the shipment to destination. After placing the shipment in a place of safety, the liability of the company as an insurer ceased, and its liability as a warehouseman began, unless the local custom prevailing in Savannah as to giving notice to consignees entered into and became a part of the contract of shipment. Ga. & Ala. Ry. v. Pound, 111 Ga. 6, 36 S. W. Rep. 312. However this may be, the company is not chargeable with any default in failing to observe this local custom or in not making delivery to the consignee, who could not be located. Relatively to him, the company had a statutory right to dispose of the shipment at public auction, upon compliance with the requirements of Civ. Code, 1895, § 2303, after waiting upon him without avail until June 7, 1902, to appear and pay freight and warehouse charges. But some time prior to that date the company had received notice that the consignor was the owner of the shipment; and even if it was under no legal duty to have previously notified the consignor of its liability to locate the consignee (American Sugar Co. v. McGhee, 96 Ga. 27, 21 S. E. Rep. 383), the company was under a duty, after becoming informed of the ownership of the property, to hold the shipment a reasonable time subject to the order of the consignor. Of course the company had a lien on the property for freight charges (Civ. Code, 1895, § 2287), and the consignor would be under an obligation to settle with the company for the freight and storage charges before exercising the right to receive the shipment at Savannah or to direct a reshipment of the property. Penn Steel Co. v. Ga. R. Co., 94 Ga. 636, 21 S. E. Rep. 577. Before it was sent to Toccoa for sale at public auction, the consignor had requested the railway company to return the shipment. The charges claimed thereon were not, it is true, tendered to the company by the consignor; yet the reason why this was not done appears to be that the officials of the company undertook to get the consent of the Southeastern Car Service Association that the claim for the accumulated charges might be waived. As pointed out by counsel for the railway company, there seems to have been no consideration for this undertaking, and the company was not bound to carry out its understanding with the consignor as to remitting storage charges in the event the necessary consent of the association could be secured. Still, the company's officials having gratuitously entered upon the project, the consignor was relieved for the time being of offering to pay the company's demand, and until the matter was finally adjusted, no right to sell the shipment at public auction could arise. Having induced the consignor to rely upon the promise to endeavor to remit a portion of the charges, the company is estopped from asserting that the promise was without consideration. It was at liberty at any time to abandon its efforts along this line and to demand, as a condition precedent to the surrender of the shipment, payment in full and of all lawful charges for freight and storage; but until such a demand and a refusal by the consignor to comply therewith, the company could acquire no

right to sell the property upon the idea that there had been a default in making payment of its just demands. The sale of the property, pending the negotiations with respect to fixing the amount which the consignor would be called on to pay, was a conversion. That this conversion was brought about through a misunderstanding on the part of some of the company's officials as to the true status of the matter cannot affect the question of the company's liability; it, at least, was bound to know how the matter stood and is responsible for the wrongful acts of its officers in disposing of the property at auction sale. It may be that it was the right of the company to plead that it acted in good faith and through the mistake of some of its officers or servants, and for this reason should be allowed to set off against the plaintiff's claim such lawful charges as the plaintiff would have been under a duty to pay before getting possession of the shipment. But no such plea was filed, no evidence was submitted as to the amount of the charges which the company was entitled to collect, and the sole contention urged upon the trial was that the company was not liable in any amount to the plaintiff. This being true, the admitted value of the property was the only measure by which the plaintiff's recovery could be fixed; and ruling only upon the single question presented for our determination, viz., whether or not a conversion of the property was shown, we hold that the trial judge arrived at a proper solution of this question."

DISTURBING THE PEACE.*

I. INTRODUCTION.

A. *Confusion as to the Meaning of the Term*—1. *Definitions of Authors.*—A "disturbing the peace" or a "breach of the peace," as it is more commonly called, is one of the few legal phrases which neither authors nor judges have carefully analyzed. Some writers have regarded the term as generic, including a number of other well-defined crimes. Thus, in one of the more recent works, it is said: "The term 'breach of the peace' is generic and includes all violations of public peace or order, or acts tending to the disturbance thereof."[1] Other writers look upon the phrase as denoting a sort of residuary clause of our criminal code. To quote from a standard authority, a breach of the peace "includes violent disturbances of public peace or order, actual, constructive, or apprehended, not constituting any other distinct offense."[2]

II. THE SUBSTANTIVE LAW OF THE SUBJECT.

A. *A Division Based Upon Blackstone's Classification.*—An analysis of the decisions shows that breaches of the peace may be divided into two classes: First, those crimes which Blackstone characterizes as "offenses against the public peace,"[3] in which terror is the gravamen of the charge; second, crimes which he calls "offenses against the public police" and bases upon the broad, indefinite principle that "the individuals of the state, like members of a well-governed family, are bound to conform their general behavior to the rules of propriety * * * and to be decent, industrious, and inoffensive in their respective stations."[4] In a word, then, a disturbance of the peace as it exists in American law today, is the result of a partial conjunction of these two common law sources. Starting with this fundamental division, we are next to consider the subject in greater detail.

(1.) Terror an Element of the Offense.—First, then, let us consider a "disturbing the peace," which is the direct off-shoot of the old common-law conception that terror is the gist of the offense. Following Blackstone's classification[5] again, this branch of the discussion divides itself into two parts: actual breaches of the peace and the so-called constructive breaches.

It will appear from a further discussion that an actual breach of the peace is determined by its actual effect; while a constructive breach is determined by its probable effect.

(a) *An Actual Breach of the Peace, Defined, Explained, and Examples Given.*—Viewed from the standpoint now under consideration, an actual breach of the peace may be defined as any act or conduct which puts persons of ordinary firmness in the immediate vicinity thereof in fear of bodily harm.[6] This definition only intends to indicate in a general way the principles involved; a correct idea of the offense can be obtained only by examining the cases which have been decided. Violence need not be inflicted upon any one, for

* While the present dean of the law department of the University of Missouri was editor of the CENTRAL LAW JOURNAL, he received numerous requests from practitioners for an article on "Disturbing the Peace." For some reason, however, he was unable to comply with these requests before the end of his editorial work and the assumption of his duties as a teacher of law. Although many years have passed since he made the change, he has not forgotten the demand for investigation in this seemingly unexplored field of our criminal jurisprudence. This year, therefore, he assigned the subject to the senior class of the department of law, of which he is dean, as the basis of competition for the "Edward Thompson prize," and the winning essay was written by Mr. Kelsey.

[1] 5 Cyc. 1024, "Breach of the Peace." See also 4 Am & Eng. Ency. Law (2d Ed.), 903.

[2] Am. Dig. (Century Ed.), "scope note," p. 970.

[3] 4 Bl. Com. 142, ff.

[4] 4 Bl. Com. 162, sec. 5.

[5] 4 Bl. Com. 142 (intro. par.)

[6] State v. Coffin (Vt.), 23 Atl. Rep. 632; State v. Alexander, 7 Rich. (S. C.) 5; Fisher v. State, 78 Ga. 258; State v. Benedict, 11 Vt. 236; State v. Riggs, 22 Vt. 321. More than half the precedents of indictments for "offenses against the peace" given by Chitty in his Criminal Law, conclude "to the terror of the quiet and peaceable subjects of our lord, the now king." See Chitty Crim. Law, Vol. 2, p. 485.

any demonstration which strikes terror to a person of ordinary firmness is sufficient. So it was said by Lord Holt in 1708: "If a number of men assemble with arms, in *terrorem populi*, though no act is done, it is a riot."[7] In a leading South Carolina case, Mr. Justice Evans enunciated the same doctrine. To quote: "If * * * (a tumultuous or noisy) act be accompanied by no circumstances calculated to excite terror or alarm in others, it would not amount to a riot; so, also, if a dozen men assemble together in a forest and blow horns, or shoot guns, or such acts, it would not be a riot. But if the same party were to assemble at the hour of midnight, in the streets of Charleston, or Columbia, and were to march through the streets crying fire, blowing horns and shooting guns, few, I apprehend, would hesitate in pronouncing it a riot. * * * And why? Because such conduct, in such a place, is calculated to inspire terror and alarm among the citizens."[8]

Thus, the following have been held to be breaches of the peace: discharging firearms in a public street at night, because such an act "is well calculated to alarm the public and cause them to be apprehensive of individual safety;"[9] breaking the windows of a house with clubs and stones, "being calculated in its nature to frighten and disturb the people within;"[10] threatening a woman with bodily injury and lurking about to put the threats into execution, so that she had just cause to be apprehensive of her individual safety;[11] shooting dogs from a porch "in a manner to cause terror and alarm to the family and inmates of the house;"[12] firing guns, blowing horns and beating tin pans in a manner to create "a just apprehension of bodily harm;"[13] shaving the tail of a horse in a frolic but with such violence as to frighten the owner and his family;[14] going armed with guns and knives, "in such a manner as naturally will terrify and alarm a peaceful people."[15]

It is probably apparent from the preceding discussion that the phrase, "disturbing the peace," in the sense of the term now under discussion, is broad enough to include affray, riot, and forcible entry and detainer. The word affray comes from the French *affraier*, to terrify. It has been defined by a leading authority as the fighting of two or more persons in some public place, to the terror of the neighborhood, and this definition is supported by the weight of authority.[16] Riot may be defined as an act of violence done by three or more persons, "to the terror of the people."[17] It has been aptly called by an old case, "a kind of assault upon the people."[18]

Hawkins tells us that the gist of forcible entry and detainer is that, "a man, either by his behavior or speech, at the time of his entry, gives those who are in possession of the tenements which he claims, just cause to fear that he will do them some bodily hurt, if they will not give way to him."[19] This principle seems to have been followed where not changed by statute.[20] It must be said, however, that few authors now consider forcible entry and detainer under "offenses against the public peace," though founded upon the same principle. Probably this is due to a statutory extension.

(b) *A Constructive Breach of the Peace, Defined, Explained and Examples Given.*—Besides actual breaches of the peace, which we have just discussed, Blackstone tells us that "anything that tends to provoke or incite others to break it, is an offense of the same denomination," and gives as examples, challenges to fight, and libe[l].[21] It must be said, however, that his examples are hard to justify on the principle he has given. Of course, in early days challenges to fight and libel were calculated to incite individuals to personal prowess to protect their honor, but it seems difficult to imagine that terror to the people, a breach of the peace would be the probable result of such personal conflicts. To be sure, it is sound public policy to discourage anything that is likely to lead to personal combat, but the principle underlying this bears little relation to the one we have enunciated under actual disturbances of the peace; it seems hardly proper to speak of challenges to fight and libel as inciting persons to break the peace, using the term in the sense under discussion. It is evident, though, that Blackstone is using the term "disturbing the peace" to mean an unlawful act. It is certainly too broad a construction to say that everything which incites to unlawful acts is a constructive breach of the peace and there seems to be no reason why acts inciting personal conflict should constitute an exception. Indeed, we now find the crimes which Blackstone designated under this head treated as distinct offenses and not as breaches of the peace. The reason is obvious. The principle becomes unworkable as society develops. Personal conflict has by degrees

[7] R. v. Soley, 11 Mod. 116.
[8] State v. Brazil, Rice (S. C.), 257.
[9] People v. Bartz (Mich.), 19 N. W. Rep. 161.
[10] State v. Batchelder, 5 N. H. 549.
[11] State v. Benedict, 11 Vt. 236.
[12] Henderson v. Commonwealth, 8 Gratt. (Va.) 708.
[13] State v. Coffin (Vt.), 23 Atl. Rep. 632.
[14] State v. Alexander, 7 Rich. (S. C.) 5.
[15] State v. Huntley, 25 N. C. (3 Ired.) 418.
[16] Wharton, Cr. L., Vol. 2, sec. 1551; State v. Warren, 57 Mo. App. 502; 4 Bl. Com. 145; 3 Inst. 158; R. v. Hunt, 1 Cox C. C. 177; Commonwealth v. Simmons, 6 J. Marsh. (Ky.) 615; Simpson v. State, 5 Yerg. (Tenn.) 356; Wilson v. State, 3 Heisk. (Tenn.) 278; State v. Perry, 5 Jones (N. C.), 9.
[17] Hawk. P. C., ch. 65, sec. 1 (7th Ed.); R. v. Soley, 2 Salk. 594; R. v. Hughes, 4 C. & P. 373; R. v. Cox, 4 C. & P. 538; Wharton Crim. L., Vol. 2, sec. 1539; May's Crim. L., p. 141 (Beale's Ed.). See *contra*, Commonwealth v. Runnels, 10 Mass. 518.
[18] Reg. v. Soley, 2 Salk. 594.
[19] Hawk. P. C., ch. 64, sec. 27.
[20] Wharton, Crim. L., sec. 1085; McLain, Crim. L., sec. 836. See Rev. Stat. Mo. (1899), sec. 3320.
[21] 4 Bl. Com. 150.

become largely obsolete as a method of settling personal grievances. That is to say, on the whole, it takes greater provocation to arouse a man to personal prowess than it did a few centuries ago. Upon this principle, then, a violent act might now be done with impunity which in the early day would have been a breach of the peace. But this is not so. Our sense of social propriety has developed and we will not permit acts which in a less advanced state of society would pass by unregarded. And though the courts still talk of acts which are "calculated to provoke to personal prowess," an examination of the cases will show that these remarks are mere *dicta* and the cases are really decided upon some of the principles enunciated in this paper,[22] namely, terror, annoyance, and so forth.

There are, however, certain offenses which may reasonably be called constructive breaches of the peace. Thus, an unlawful assembly and rout lead almost necessarily to riot which terrorizes the people. So Mr. Wharton says: "An unlawful assembly is an assembly of three or more persons who, with intent to carry out any common purpose, assemble in such a manner, or so conduct themselves when assembled, as to cause persons in the neighborhood of such assembly to fear on reasonable grounds that the persons so assembled will disturb the peace tumultuously, or will by such assembly needlessly and without any reasonable occasion provoke other persons to disturb the peace tumultuously."[23] Viewed from this standpoint, unlawful assembly is simply the inception of a riot. And so it seems to have been regarded by well-known writers.[24]

It must be said, however, that the statutory unlawful assembly is much broader than just indicated, but it would require a vivid stretch of imagination to make the statutory offense a constructive breach of the peace. Thus, in most states, it is provided in words or in substance: "If three or more persons shall assemble together with the intent, or being assembled shall agree mutually to assist one another, to do an unlawful act, with force or violence, against the person or property of another, or against the peace or to the terror of the people, such persons so assembling, and each of them shall be deemed guilty of an unlawful assembly, and on conviction thereof shall be punished as for a misdemeanor."[25] A careful reading of this statute makes it evident that only a part of the unlawful purposes for which meetings can be held under it could by any construction lead to a breach of the peace. It is believed, therefore, that the real constructive breaches of the peace are unlawful assembly and rout. And these, because they are the first steps towards acts which do terrify, rout being simply an unlawful assembly that has made one step towards a riot.

(2.) *Another Phase of the Subject.*—(a) *Introductory Remarks.*—Second in our classification, it will be remembered as a "disturbance of the peace," which traces its origin to the old common law, "offenses against the public police." And here, let it be said at the outset, that in speaking of these offenses the courts have sometimes talked of them as a nuisance, sometimes as disorderly conduct, and sometimes as a breach of the peace. Considered from the standpoint of our first classification, they are really not disturbances of the peace at all. That they have thus been called is probably due to two causes. First, to indefinite statutes; second, to the loose use of language by the courts. But this paper would not be complete without a discussion of this phase of the subject, for without it the decisions involving crimes which the courts have called breaches of the peace would involve irreconcilable conflict.[26]

(b) *An Actual Breach in this Second Sense*—i. *Definition.*—In this sense, following our former classification, an actual breach of the peace, or perhaps, more properly, disorderly conduct, may be defined as an act or conduct which annoys, morally offends or endangers the public. This definition is purposely indefinite. It aims to indicate only in a general way the principles involved. It really means that something has been done which in the interest of decency and good order ought not to be done. So far as the details of the offense can be indicated, they will appear from a further discussion of the subject.

ii. *Exposition of the Subject.*—Annoyance is a very indefinite term, but many phases of disturbing the peace seem to be based upon it. The real question, it is believed, is, did the acts or conduct of the defendant unreasonably interfere with the comfort of others? So conduct yourself as not unreasonably to infringe on the rights of others is the principle involved.[27] Thus, every person has a right to reasonable quietness on Sunday, a right to observe the solemnities of worship, a right to meet for lawful purposes and transact his business, a right to be free from unreasonable noises, and so on. He who unreasonably interferes with these rights disturbs the

[22] See State v. Murphy, 6 So. Rep. 107; State v. White, 28 Atl. Rep. 968. Arkansas has partially incorporated this old idea into a statute. Stat. Ark. (1904), sec. 1648.

[23] Wharton, Crim. L. 1535.

[24] 4 Bl. Com. 146; Bishop, Crim. L., sec. 1227. See also R. v. Cox, 4 C. & P. 538; R. v. Soley, 2 Salk. 594.

[25] Rev. Stat. Mo. (1899), sec. 2129.

[26] Thus, in the American Digest (Century Ed.), under the heading, "Breach of the Peace," we find the following examples of the offense: Driving a carriage at a dangerous rate through a crowded street (U. S. v. Hart, Fed. Cas. No. 15,316); calling a workman "a damned scab" (Commonwealth v. Redshaw, 12 Pa. Co. Ct. Rep. 91); shooting from a porch so as to frighten the women within (Henderson v. Commonwealth, 8 Gratt. (Va.) 708).

[27] This seems to be a modern extension to personal rights of the old maxim, *sic utere tuo ut alienum non laedas.* 4 Bl. Com. 162, 167; Cooley, Const. Lim. 572, and note.

peace, or does an act to the common nuisance. This doctrine, as applicable to the Sabbath, is clearly set forth by Mr. Justice Kennedy of the Philadelphia court. A newsboy had been brought before him for disturbing the peace of the Sabbath by crying his papers. Though he was released because it did not appear that any one was disturbed, the court used this language which shows clearly the scope our inferior courts are inclined to give the term "disturbing the peace" in this sense: "The crying of newspapers in a public street on Sunday is a breach of the peace. As well might the oyster man cry his oysters or the charcoal man ring his bell; the peace of Sunday may be disturbed by acts which on other days cannot be complained of; such acts as interfere with the rights which the law vouchsafes the public who desire to observe that day as a period of religious observance and rest from worldly business. In regard to this question, I concur in the doctrine that the law gives to the public the right of enjoying the Sabbath as a day of rest and of religious exercises, free and clear of all disturbance from merely unnecessary and unallowed worldly employment. That where the law is contravened in such a manner as to disturb that enjoyment by noise or disturbance accompanying it or incident to it, it is a breach of the peace."[28]

The courts have always shown a readiness to punish any act that is offensive to the moral sense of the community. Usually they speak of such crimes as "to the common nuisance,"[29] but occasionally a court refers to them as breaches of the peace. So, a New York city court held that an officer was justified in breaking down a door and arresting without a warrant a prostitute who was soliciting men for immoral purposes by tapping on the window.[30] Upon this principle it has been held that insolent, indecent language to a justice of the peace before whom a case is pending, is a breach of the peace;[31] calling one a "God damned son-of-a-bitch" and other names, refusing to give his name when requested and threatening to kill defendant if he attempted to arrest him;[32] offensive and indecent conversation to a woman;[33] swearing and cursing in a city street,[34] saying to a crowd, "Any man that made fun of my dinner is a damned son-of-a-bitch, and his mother is a bastard;"[35] calling a non-union man a "damned scab;"[36] swearing for five minutes in a public place;[37] singing a ribald song in a public street for ten minutes,[38] and so on.

iii. *Origin of this Doctrine.*—This extension of the doctrine of disturbing the peace to offenses which bear a strong analogy to common law nuisances except that they are single offenses, is in no small measure due to the influence of indefinite statutes. Thus, in most states it is provided either in exact words or in effect: "If any person or persons shall willfully disturb the peace of any neighborhood, or of any family, or of any person by loud and unusual noise, loud and offensive or indecent conversation * * * every person so offending shall, upon conviction, be adjudged guilty of a misdemeanor."[39]

With the assistance of such statutes, it has not been difficult for courts to speak of disturbing the peace when really dealing with a slightly modified form of a nuisance.[40] As said before, we have thus developed a kind of peace disturbance which has little in common with the old idea that terror is the gist of offense.

(c) *A Quasi-Constructive Form of the Offense.*—Recurring again to our second classification, as including things prejudicial to the welfare of the community, we find this idea carried over into a kind of quasi-constructive form of the offense. While the doctrine cannot be said to be fully established, there is a respectable decision squarely announcing that dangerous conduct is a breach of the peace. This case has since been quoted with approval by another court. A mail carrier driving his wagon at a rapid rate through the streets of Philadelphia was arrested by an officer without a warrant. The case finally came to the United States district court and the arrest was upheld, the court announcing a decision that can only be justified upon the doctrine just stated; to quote the language of Washington, J.: "The court is of the opinion that driving a carriage through a crowded or populous street, at such a rate or in such a manner as to endanger the safety of the inhabitants, is an indictable offense at common law and amounts to a breach of the peace."[41] This principle was approved in a North Carolina case,[42] and though such acts can hardly properly be said to be breaches of the peace, these decisions indicate a possible extension of the use of that term.

(3.) *How Many must be Disturbed.*—Probably at

[28] Dupuy v. Commonwealth, Brightly's Rep. 44.

[29] State v. Toole, 106 N. C. 736, 11 S. E. Rep. 168. See Chitty, Crim. L. 494, for precedent of indictment.

[30] Harft v. McDonald (N. Y.), 1 City Ct. Rep. 181.

[31] State v. Sturges, 48 Mo. App. 263. See dissenting opinion by Judge Bland in State v. Maggard, 80 Mo. App. 290, and Wharton, Crim. L., secs. 1431, 1431a.

[32] Davis v. Burgess, 54 Mich. 514, 20 N. W. Rep. 540.

[33] State v. Fare, 39 Mo. App. 110. See also State v. Brumley, 53 Mo. App. 126.

[34] State v. Fogerson, 29 Mo. 416.

[35] Hearne v. State, 34 Ark. 550.

[36] Commonwealth v. Redshaw, 12 Pa. Co. Ct. Rep. 91.

[37] State v. Chrisp, 85 N. C. 528, 39 Am. Rep. 713.

[38] State v. Toole, 106 N. C. 736, 11 S. E. Rep. 168. But in Tennessee it is no offense to abuse a person with opprobrious and offensive words. State v. Taylor, 35 Tenn. (3 Sneed) 662.

[39] Rev. Stat. Mo. (1899), sec. 2159; Stat. Ariz. (1901), p. 1250, sec. 379; Stat. Ark. (1904), sec. 1646; Rev. Stat. Ill. (1903), p. 627, sec. 56; Stat. I. T. (1899), sec. 1143; Stat. Vt. (1894), sec. 5043.

[40] State v. Chrisp, 85 N. C. 528, 39 Am. Rep. 713; State v. Toole, 106 N. C. 736, 11 S. E. Rep. 168.

[41] United States v. Hart, Fed. Cas. No. 15,316. See also Commonwealth v. Allen, 148 Pa. St. 358; McLean, Crim. L., sec. 1184.

[42] State v. Lanier, 71 N. C. 288.

common law it is not an indictable offense to disturb the peace of an individual.[43] This theory is in harmony with the policy of the early criminal law to take cognizance only of those things which concern the public, and to leave the individual to redress his wrongs in tort.[44] But as to the actual number which must be disturbed if the act is done under such circumstances that it might disturb more than one, the courts are not agreed.

(a) *Two Conflicting Views.*—In an Indian Territory case it was said: "It is not necessary * * * that any person should testify that he was disturbed by the conduct of the defendant in order to sustain the charge (of disturbing the peace). The jury are to consider all the facts and circumstances in the case, and then arrive at a conclusion as to whether the acts of the defendant disturbed the inhabitants of the community or not."[45] Substantially in accord with this was an Indiana "charivari" case.[46] This seems too broad a doctrine, and it has been distinctly repudiated in a few cases. Thus, in St. Charles v. Meyer,[47] the supreme court of Missouri reversed a conviction of disturbing the peace because "no witness on either side testified that he, or any other person, was disturbed" by the acts of the defendant. In line with this, it has been held that in the absence of statute the disturbance of a single individual is not a breach of the peace.[48]

(b) *The Correct Doctrine.*—The correct doctrine, it is believed, is that the evidence must show that persons were terrified,[49] annoyed or morally offended, and that the act was of a character to produce such effects upon persons of ordinary firmness or sensibility.[50]

B. *The Application of the Foregoing Principles to Modern Statutes.*—It has no doubt been observed that up to this point little reference has been made to the statutory law of the subject. There is sound reason for this. Such statutes uniformly begin: "If any person shall willfully or maliciously disturb the peace of any neighborhood, family or person," and then follows the manner in which this shall be done in order to constitute the offense.[51] The real problem, then, has been to find when the "peace is disturbed." Having done this, we may now turn to a consideration of statutes. In general we have said whatever frightens, annoys, morally offends or endangers the public is a breach of the peace. Two other things are included in modern statutes: (1) The disturbance must be "willful or malicious;"[52] (2) it is made an offense to disturb a person, as well as a neighborhood or family.[53] So far as willfulness of the act is concerned the statutes do not seem to have changed the common law. Not a single case cited in this paper indicates that one who "frightens, annoys or offends" by accident,[54] mistake or in the necessary protection of his person or property, has disturbed the peace.[55] On the other hand even where there is no statute requiring it, acts willfully done to the disturbance of the peace are not excused by innocence of purpose.[56]

Malice in an act ordinarily means that it is done intentionally.[57] In this sense malice merges into willfulness, and would be governed by the rules we have just given. There are some decisions,[58] however, laying considerable stress on this side of statutory interpretation, and these courts might hold that a practical joke or a "charivari" are not disturbances of the peace because innocently done.

In constructive breaches of the peace intent seems to be an essential element of the offense.[59] Thus, in an English case where the parties were charged with riot, Charles, J., used the following language in instructing the jury: "But it may be that you may be of opinion that they did not proceed far enough * * * to make them rioters. In that case, if you should think that the intention of this assembly was to hold the meeting by force, but that they had not proceeded far enough in that intention to make them riotous, then you will be at liberty, if you think fit, to find them guilty of being participators in an unlawful assembly."[60] Having thus considered the substantive law of the subject the procedure now demands our attention.

III. *Procedure.*—In discussing the procedure in breach of the peace cases, we will consider surety of the peace, arrest, the petition, the evidence, the instruction of the court, and the punishment. There is little out of the ordinary criminal procedure in breach of the peace cases, and hence we may treat this phase of our subject more cursorily than we have the preceding question of substantive law.

A. *Surety of the Peace.*—Surety of the peace has been defined as a species of preventive justice, and is said to consist "in obliging those persons whom there is probable ground to suspect

[43] State v. Schlottman, 52 Mo. 164; Brooks v. State (Miss.), 7 So. Rep. 494.

[44] Maine's Ancient Law, Vol. 1, p. 355, *f.f.*

[45] Standcliff v. United States, 82 S. W. Rep. 882.

[46] Bankus v. State, 4 Porter (Ind.), 114.

[47] 58 Mo. 86.

[48] State v. Schlottman, 52 Mo. 164.

[49] State v. Lanier, 71 N. C. 288.

[50] 4 Bl. Com. 167; State v. Chrisp, 85 N. C. 528, 39 Am. Rep. 713; R. v. Graham, 16 Cox C. C. 433.

[51] Rev. Stat. Mo. (1899), sec. 2159; Stat. Ariz. (1901), p. 1250, sec. 379; Stat. Ark. (1904), sec. 1646; Rev. Stat. Ill. (1903), p. 627, sec. 56; Stat. I. T. (1899), sec. 1143; Stat. Vt. (1894), sec. 5043.

[52] See citation of statutes, note 51.

[53] State v. Schlottman, 52 Mo. 164; Brooks v. State, (Miss.), 7 So. Rep. 494.

[54] Winn v. Hobson, 54 N. Y. Super. Ct. 330.

[55] Klum v. State, 1 Blackf. (Ind.) 377; State v. Harrell, 107 N. C. 945, 12 S. E. Rep. 439.

[56] State v. Alexander, 7 Rich. (S. C.) 5; Bankus v. State, 4 Porter (Ind.), 114.

[57] Bouv. Dict., "Malice."

[58] State v. Jones, 53 Mo. 486; Richardson v. State, 5 Tex. App. 470.

[59] Bishop, New Crim. L., sec. 489; Wharton, Crim. L., sec. 1535.

[60] R. v. Graham, 16 Cox C. C. 434.

of future misbehavior to stipulate with, and give full assurances to the public, that such offense as is apprehended shall not happen, by finding pledges or securities to keep the peace."[61] In general, a judge of a court of general jurisdiction or a justice of the peace may, upon his own initiative, require surety where a breach of the peace is threatened or occurs in his presence.[62] But we are mainly concerned here with the power of one individual to require another to give surety. Surety may be granted where the applicant appears to the satisfaction of the court to have just cause for fearing that the person from whom surety is demanded will do a future injury to himself, his wife, his child or his habitation.[63] At common law, it was sufficient for the complainant to make oath that he was in fear of bodily injury and ask for surety, not through malice, but for his bodily protection.[64]

No cases can be found where surety of the peace has been required because one person feared another would annoy or morally offend him. Fear of injury, alone seems to be the only ground for such recognizance. In this we have kept fairly close to the original idea of a breach of the peace.

On issues formed upon an application for a recognizance, it seems that two questions are raised: 1. Did the complainant have just cause to fear? 2. Was his application made through malice? But under some statutes the issues are narrowed to the first question.[65] In general, doing anything that is a breach of the peace, or a higher crime, will forfeit a recognizance, *i.e.*, make the individual and his bondsmen debtors to the state for the amount agreed upon.[66] Bacon says mere words do not constitute a ground of forfeiture,[67] but with the modern tendency to hold certain words a disturbance of the peace, this should no longer be true.

B. *Arrest.*—Of course, an officer may arrest a disturber of the peace upon a warrant properly issued, but his right to arrest does not stop here if the offense is committed in his presence. Any officer may arrest without a warrant an offender who commits a breach of the peace in his presence.[68] Indeed, in an English case, it is said by Alderson, J.: "If a breach of the peace is in the act of being committed in the presence of a constable, that constable is not only justified but bound to prevent it, or put a stop to it, if it has begun, and he is bound to do so without a warrant."[69] In making such arrests, however, "it is not lawful to kill the party accused if he fly from the arrest, though he cannot otherwise be overtaken."[70]

American courts, particularly, have shown a disposition to give a liberal interpretation to the term, "in the officer's presence," as used in this connection. So it was held that where a railway conductor telegraphed ahead for an officer, he might arrest a disturber of the peace without a warrant though he did not see the breach.[71] Likewise, a person who fired a pistol across the street from an officer, was sufficiently in his presence;[72] likewise, officers called in by another may assist in making arrests though they did not see the misdemeanor committed.[73] It has been held in Ohio that an officer should not make an arrest without a warrant, for a breach of the peace, where there is no necessity for making the arrest forthwith and an opportunity is given to procure a warrant,[74] but this seems contrary to the usual rule, and it is believed that an officer is not required to enter into nice calculation as to the opportunity for securing a warrant if the breach is committed in his presence. Indeed, it has been held that he need not wait until a breach is actually committed but may act upon appearances of things.[75]

An able bodied private citizen must assist an officer in case of a breach of the peace if called on to do so, but it seems that it must appear that it was reasonably necessary for the officer to have his assistance.[76] Furthermore, a private citizen may arrest the offender when a breach of the peace has been committed in his presence, but not after the disturbance has ended.[77]

C. *Indictment.*—On principle, an indictment for disturbing the peace should set out every ultimate fact which is a necessary element of the offense. As said by Wilson, J., in a leading case: "To charge merely that the defendant disturbed

[61] Hochheimer, The Law of Crimes and Criminal Procedure, etc., p. 239. See *Ibid.*, "Surety for Good Behavior," which does not obtain in the United States.

[62] Bac. Abr., Surety of the Peace, "A."

[63] Bac. Abr., Surety of the Peace, "D."

[64] Bac. Abr., Surety of the Peace, "E." The following form is believed to have the stamp of judicial sanction where not changed by statute: "Isaiah Watkins swears, as he verily believes, that he has just cause to fear, and does fear, that William Beckwith will injure his person by violence, and that he makes this affidavit only to secure the protection of the law, and not from anger or malice. Isaiah Watkins. Subscribed and sworn to before me, this, 14th day of February, 1863. Joseph E. Mitchell, J. P." Beckwith v. State, 21 Ind. 225; Davis v. State, 138 Ind. 11, 37 N. E. Rep. 397; State v. Bass, 75 N. C. 139; R. v. Mendez, 1 Str. 473. See 21 Jac. I, ch. 8, for statutory change which requires applicant to show cause for requiring surety. See also 4 Bl. Com. 255.

[65] Stone v. State, 97 Ind. 345.

[66] 4 Bl. Com. 256.

[67] Bac. Abr., Surety of the Peace, "H."

[68] 4 Bl. Com. 292; Vandeveer v. Mattocks, 3 Porter (Ind.), 479; Commonwealth v. Tobin, 108 Mass. 426; Davis v. Burgess, 54 Mich. 514, 20 N. W. Rep. 540; Taafe v. Slevin, 11 Mo. App. 506; Beville v. State, 16 Tex. App. 70.

[69] Reg. v. Brown, 1 C. & M. 314.

[70] East P. C. 302; Fort. 271.

[71] B. & O. R. Co. v. Commonwealth, 31 Atl. Rep. 801.

[72] People v. Bartz (Mich.), 19 N. W. Rep. 161.

[73] Main v. McCarty, 15 Ill. 441.

[74] State v. McGinnis, 30 Ohio Dec. 4.

[75] Hays v. Mitchell, 80 Ala. 183.

[76] Reg. v. Brown, 1 C. & M. 175.

[77] Phillips v. Trull, 11 Johns. (N. Y.) 486. See also Winn v. Hobson, 54 N. Y. Super. Ct. 330.

and broke the public peace by 'tumultuous and offensive carriage, threatening and challenging' the person named is nothing more than the opinion of the pleader, as to the nature of the supposed offense and modes or mode by which it was committed."[78] In line with this principle, it has been held that a conviction of riot cannot be had upon an indictment that does not contain an allegation that there was terror as a result of the act.[79]

But it must be said that many of our courts have overlooked the principles of good pleading in dealing with this offense. Thus, in Missouri, it has been held sufficient if the indictment follow the language of statute, which reads as follows: "If any person or persons shall willfully disturb the peace of any neighborhood, or of any family, or of any person, by loud and offensive or indecent conversation, or by threatening, quarreling, challenging or fighting, every person so offending, shall upon conviction, be adjudged guilty of a misdemeanor."[80] The decision of some other jurisdictions sustain this position, though it must be said to be unsound on principle.[81] A safer method of pleading would be to set out fully the ultimate facts constituting the essential ingredients of the offense. Ultimate facts, of course, are those facts to which the law attaches legal consequences.

D. *Instructing the Jury.*—American juries have been called upon to decide breach of the peace cases in a most unusual manner. A Missouri decision gives a typical example. Because the trial judge omitted the word "loud" from his instruction, the case was reversed, though no fault was found with his omission to tell the jury when one's peace is disturbed.[82] Substantially to the same effect was a Texas decision, in which it was held a reversible error to refuse the following instruction: "Unless you believe from the evidence, beyond a reasonable doubt, that the language used by defendant was calculated to disturb the peace of the persons then present in G. B. Stewart's store, you will find the defendant not guilty."[83] Of course, it is apparent that this is like telling the jury if you believe Smith murdered Jones by shooting him with a gun, you shall find him guilty. It leaves them without a legal standard to determine what is a breach of the peace.

It is suggested that something like the following would be nearer a correct instruction: The jury must find (1) that the defendant did the acts complained of in the sight or hearing of a person or persons; (2) that said acts were in their nature calculated to frighten, annoy, or morally offend persons of ordinary sensibilities, and did in fact frighten, annoy, or morally offend some; (3) that the acts complained of were not accidental or done under some necessity to protect life or property.

F. *The Punishment.*—Blackstone tells us that the felonious breaches of the peace are strained up to that degree by virtue of statutes.[84] If this be true, American statutes have toned them down again, so that they are misdemeanors, which means they are punishable "by fine or imprisonment in the county jail, or both."[85]

IV. CONCLUSION.

It will be remembered that we indicated at the beginning that the law of "disturbing the peace" is involved in much confusion. An analysis of the decisions makes it apparent that the modern offense of this name is the result of a partial conjunction of two common-law sources, described by Blackstone as "offenses against the public peace," and "offenses against the public police." Terror is the gist of the offspring of the former; annoyance, using the term in its broadest sense of the latter. Statutory interpretation is driven back to this division, which is fundamental in an intelligent interpretation of the law of this subject. The procedure in such cases has not always been sound, so intimately are substantive law and procedure interwoven. With a clearer understanding of the ultimate elements of the crime there should be little difficulty in adjusting the procedure to the sound rules of criminal practice.

As a final word,—with the further development of higher sense of social order, we may expect a "disturbing the peace" to still further encroach upon the old common-law, "offenses against the public police," for the underlying principle of these offenses is that such restraints must be imposed upon each individual as are demanded by the health, comfort, safety and general welfare of society.

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[78] State v. Matthews, 42 Vt. 542. See State v. Coffin, 64 Vt. 25, 23 Atl. Rep. 632.

[79] Steur v. State, 59 Wis. 472, 18 N. W. Rep. 433. See also State v. Archibald, 59 Vt. 548, 9 Atl. Rep. 462; State v. Hanley, 47 Vt. 290.

[80] Rev. Stat. (1899), sec. 2159; State v. Fare, 39 Mo. App. 110; State v. Fogerson, 29 Mo. 416; State v. Ramsay, 52 Mo. App. 668.

[81] State v. Hutson, 40 Ark. 361; Moore v. State (Ark.), 6 S. W. Rep. 17; State v. Moser, 33 Ark. 140; State v. Craddock (Kan.), 24 Pac. Rep. 949.

[82] State v. Maggard, 80 Mo. App. 286.

[83] Williams v. State, 34 S. W. Rep. 926.

[84] 4 Bl. Com. 142.

[85] Rev. Stat. Mo. (1899), sec. 2395.

CORPORATIONS — CONTRACT OF FOREIGN CORPORATION IS VOID, EVEN AFTER CORPORATION COMPLIED WITH THE STATUTE, WHEN.

UNITED LEAD CO. v. J. W. REEDY ELEVATOR MFG. CO.

Supreme Court of Illinois, June 14, 1906.

Where a foreign corporation made a contract in the state at a time when it had not complied with Hurd's Rev. Stat. 1903, ch. 32, whereby such corporation could maintain no action on any demand, the contract was void, and no action could be maintained thereon, even after the corporation complied with the statute,

The appellate court for the first district affirmed the judgment of the circuit court of Cook county, which was in favor of appellee, in a suit in assumpsit brought in the latter court by appellant against appellee. A certificate of importance having been obtained, the cause is brought here by further appeal. The following statement of the facts is that of the appellate court:

"September 8, 1904, appellant, a New Jersey corporation, doing business in the state of Illinois, brought suit for goods sold and delivered, against appellee. On December 7, 1904, appellee moved to dismiss upon the ground that appellant, at the time of bringing suit and when the motion was made, was and is a foreign corporation doing business in Illinois, and had not filed with the secretary of state its articles or certificate of incorporation, and was not authorized to do business in Illinois. This motion was supported by an affidavit. Upon the hearing on this motion it was denied and appellee was given leave to file pleas instanter. In obedience to this order appellee filed the general issue and a special plea, which is in substance as follows: 'And for a further plea, by leave of court, defendant says that plaintiff is organized for profit, is not a railroad or telegraph company, nor in the insurance, banking or money loaning business; that the merchandise for which suit is brought was sold to defendant and by it brought within the state of Illinois since January 1, 1902; plaintiff had not at the commencement of this suit, as by the statute provided, filed with the secretary of state its articles or certificate of incorporation, statement of capital stock represented in Illinois, nor designated officer on whom service could be had; nor had the secretary of state, at commencement of suit, issued certificate entitling plaintiff to do business in Illinois, as provided by statute; nor had plaintiff prior to or at the commencement of suit, been licensed to do business in Illinois as by statute provided; plaintiff at the time of commencement of suit had no certificate of authority, nor had any ever been issued to it to do business in Illinois, as provided by the statutes of said state. Wherefore, by force of the statute in such case made and provided, the plaintiff cannot maintain its aforesaid action. And this defendant is ready to verify. Therefore it prays judgment if plaintiff ought to have its aforesaid action against it,' etc. Appellee filed a similiter to the general issue and demurred to the special plea. The court overruled the demurrer. Appellant elected to stand by the demurrer. Thereupon the court ordered, 'therefore it is considered by the court that defendant go hence without day and that plaintiff takes nothing by the aforesaid action,' and entered a judgment for costs against appellant. The case is brought to this court by appeal. Appellant assigns as error the action of the trial court in overruling its demurrer and entering judgment in bar of its cause of action."

SCOTT, C. J. (after stating the facts): Section 67 b, ch. 32, Hurd's Rev. St. 1903, provides that no foreign corporation organized for pecuniary profit shall be authorized or permitted to transact business in this state, or to continue business herein if already established, until it shall designate some person as its agent or representative in this state on whom service of legal process may be had. Section 67d of the same chapter provides a punishment for any neglect or failure to comply with the act, and contains this further language: "In addition to which penalty, on and after the going into effect of this act no foreign corporation, as above defined, which shall fail to comply with this act, can maintain any suit, or action, either legal or equitable, in any of the courts of this state upon any demand, whether arising out of contract or tort." The two sections above referred to are parts of an act which became effective on July 1, 1899. Laws 1899, p. 118.

According to the averments of this plea, appellant transacted the business in question in this state at a time when it was forbidden by our laws so to do, and it was not permitted by our laws to maintain any suit, either legal or equitable, in any of the courts of this state when this suit was instituted. Appellant's contention is, that its right to bring this action is not barred by these statutes; that they merely abate this suit, leaving to the foreign corporation the right to maintain its action if it shall hereafter qualify to transact business in this state.

In the case of Cincinnati Mutual Health Assurance Co. v. Rosenthal, 55 Ill. 85, 8 Am. Rep. 626, a similar question arose, the foreign corporation there being an insurance company which had brought suit in this state upon a note given to it for stock in the corporation and for premium on a policy of insurance. It appeared that the contract in pursuance of which the note was given was entered into and the note executed and delivered in this state when the plaintiff was not authorized to transact business in this state, for the reason that it had not complied with the laws of the state in reference to foreign insurance companies. Its lack of authority to conduct its affairs in this state was interposed in bar of the action, and the court, after pointing out that the statute expressly prohibited such a company from effecting insurance or transacting business in this state until after it should have complied with the statute in reference thereto, used this language: "When the legislature prohibits an act or declares that it shall be unlawful to perform it, every rule of interpretation must say that the legislature intended to interpose its power to prevent the act, and, as one of the means of its prevention, that the courts shall hold it void. This is as manifest as if the statute had declared that it should be void." This case has been cited with approval on a similar proposition in Penn v. Bornman, 102 Ill. 523, and Illinois State Trust Co. v. St. Louis, Iron Mountain & Southern Railway Co., 208 Ill. 419, 70 N. E. Rep. 357.

The contract upon which this suit was brought, having been entered into in this state when appel-

lant was not permitted to transact business in this state, is in violation of the plain provisions of the statute, and is therefore null and void, and no action can be maintained thereon at any time, even if the corporation should at some time after the making of the contract qualify itself to transact business in this state by a compliance with our laws in reference to foreign corporations that desire to engage in business here.

The judgment of the appellate court will be affirmed.

Judgment affirmed.

NOTE.—*Foreign Corporation may in most States Sue for Recovery of Demand Growing out of Transactions made without having Filed Certificate of Incorporation or Appointment of an Agent by Subsequently Complying with the Statutes of the State in which the Transaction Took Place.*—While in Illinois the law now is against the overwhelming weight of authority upon the subject, there is no telling how the case may be decided the next time the question is before it. The holding is harsh and against good sound sense. It is to be observed that the Illinois statute, while it states that "no person who fails to comply with this act can maintain any suit or action, either legal or equitable, in any of the courts of this state upon any demand, whether arising out of contract or tort," yet it does not say that after complying with the statutes a foreign corporation cannot maintain an action upon a previous transaction.

It was held in Missouri by Mr. Justice Barclay, one of the ablest of the Missouri judges, upon a statute worded identically the same as the Illinois statute, that a corporation, although it had brought an attachment suit without having complied with the law, but did comply with it before the return day of the process, that the action could then be maintained. Says Mr. Justice Barclay: "The statute does not in express terms forbid the bringing of an action by such a company. It declares that it cannot 'maintain' an action, not having complied with the law. What was the paramount object of the enactment?" This question does not seem to have bothered the heads of the Illinois judges, and yet it is the very kernel in the nut to an intelligent solution of the problem. He answers the question as follows: "Not to exclude such concerns from participating in the business done in Missouri, but to compel compliance with certain conditions by them. Those conditions were imposed with a view, probably, to place foreign and domestic companies on a footing of equality in the field of commerce. The object of the law was rather to induce observance of those conditions than to deprive any foreign corporation of a right of action or other property." It certainly seems like good "horse sense" to so conclude, and the conclusion seems to us as apropos of Illinois as Missouri. Then he says: "Keeping the general purpose of the law in view, what are we to understand by the word 'maintain' as used in the third section?" Here is analysis we do not find in the Illinois opinion, and yet it is the essence of sound judgment. Then he goes on to say: "As its structure suggests, it signifies literally 'to hold by the hand;' hence (in ordinary use) 'to uphold, to sustain, to keep up,' while in pleading it is defined to mean 'to support what has already been brought into existence.' Anderson's Law Dict. It is nothing new to the law that a party may maintain an action, although at its outset a legal barrier to it existed. This is illustrated by the law touching the defense of another action pending, which defense, though good when part of record, may be defeated by a dismissal of the prior action and a statement of that fact by way of reply to the answer containing that defense. Warder v. Henry, 117 Mo. 530, 23 S. W. Rep. 776, 1 Ency. Pl. & Pr. 775. It is not necessary at this time to consider whether this statute should have a broad or narrow construction at our hands, or whether it should be viewed as penal or remedial. It certainly must have a fair and reasonable reading, and should not be enlarged beyond its natural meaning to accomplish the forfeiture of a right of action. No corporation having failed to obey this law can maintain an action. The corollary is that, when it has complied, it may maintain the action. The prohibitory command does not reach the right to begin the action. We should not broaden the language to destroy that right. There is a well defined distinction between beginning and maintaining an action, viewed with reference to the facts of the controversy now before us. We are bound to assume that the word 'maintain' was chosen to express the exact shade of meaning intended by the law makers. It does not, with its present context, seem to also include the word 'begin.'" Philpots v. Jones, 2 Ad. & El. 41.

It is refreshing to read such opinions. Compare it to the Illinois opinion, which is the principal case, and what a world of meaning is unfolded in the word 'judgment' as it relates to the conclusions of the two courts. One is case opinion, the other is judgment. The one dignifies the court which rendered it, the other —— ——. Mr. Justice Barclay's opinion is well sustained by the following cases: Town v. Bowers, 81 Mo. 491; West v. Citizens, 27 Ohio St. 1; Catlin v. Ins. Co., 1 Sumner, 439; Rush v. Frost, 49 Iowa, 183; Ball v. Railway, 71 Iowa, 806; Blood v. Harrington, 8 Pick. 558; Lumber Co. v. Hotel Co., 2 Pac. Rep. 1073; Orange Nat. Bank v. Traver, 7 Fed. Rep. 146; Ginn v. New Eng. Mtg. Co., 92 Ala. 135, 8 So. Rep. 388; Utley v. Clark-Gardner, etc., 4 Colo. 369; Kindel v. Beck, etc., 19 Cal. 310, 35 Pac. Rep. 538; Singer Mfg. Co. v. Effinger, 79 Ind. 264; O'Reily, etc. v. Green, 40 N. Y. Supp. 360; Peck Mfg. Co. v. Groves, 6 S. Dak. 504, 62 N. W. Rep. 109; Tex. Land & Mtg. Co. v. Worsham, 76 Tex. 556, 13 S. W. Rep. 384.

BOOK REVIEWS.

BEALE ON INNKEEPERS AND HOTELS, THEATERS AND SLEEPING CARS.

This is a work which brings the law upon the subject up to date. The historical setting of the law is not neglected, so the author gives an insight into the life in the inns of mediaeval England. We regard it always helpful and generally necessary to a correct understanding of the law on any subject that its history be given. The developing of the general principles of the law is concise, and in the more difficult portions of the subject, those where there is a conflict of authority and in the newer development of the law where there is but slight authority, the author has given a lengthy and careful discussion of the subject. There is also included in this valuable work, along with the law of innkeepers proper, such principles of the law as have been developed with regard to other houses of entertainment, such as boarding and lodging houses, res-

taurants and theaters, and the principles regulating the action of sleeping car companies, which partake something of the character of innkeepers.

This book contains the authorities cited in the American Digest through the second volume of 1905; the English Annual Digest for 1905; and the Canadian and other colonial digests for 1904, though the author does not claim that every case has been cited. The statutes of various states are set forth in an appendix. The work is a good one by a respected author on a live subject, and is valuable in any state. It is published by William J. Nagle, of Boston, bound in buckram, and contained in 621 pages.

BOOKS RECEIVED.

A Treatise on the Law of Municipal Corporations. By Howard S. Abbott, of the Minneapolis Bar. Late Special Master in Chancery Union Pacific Railroad Receivership; Master in Chancery U. S. Circuit Court; Lecturer on Public and Private Corporations and Civil Law, University of Minnesota. Vol. III. St. Paul: Keefe-Davidson Company, 1906. Review will follow.

The American Digest Annotated, Continuing without Omission or Duplication the Century Edition of the American Digest, 1658 to 1896. 1906A. A Digest of all Current Decisions of all the American Courts, as Reported in the National Reporter System, the Official Reports, and elsewhere, together with important English Cases, from October 1, 1905, to March 30, 1906. Prepared and Edited by the Editorial Staff of the American Digest System. St. Paul, Minn. West Publishing Co., 1906. Review will follow.

Supplement to Snyder's Interstate Commerce Act and Federal Anti-Trust Laws, embracing the railway rate bill, approved June 29, 1906, amending the commerce act and Elkins act. With an introduction and full notes of judicial decisions rendered since the publication of the work in July, 1904, with a reference to the Anti-trust laws of the several states, including also the employers' liability bill, pure food bill, meat inspection bill and hall-mark or jewelers' liability bill. Containing also index and table of cases. By William L. Snyder, of the New York Bar. New York. Baker, Voorhis & Company, 1906. Review will follow.

American Consular Jurisdiction in the Orient. By Frank E. Hinckley, Doctor of Philosophy, Columbia University School of Political Science; Clerk of the United States Court for China. Washington, D. C. W. H. Lowdermilk and Company, 1906. Review will follow.

HUMOR OF THE LAW.

It was a charge of assault and battery and the prisoner, a negro woman, was in the witness box and the question was put to her: "What have you to say to the charge?" "Well yo' hon'ah ah has dis to say. Dat dar chile what I swat side de haid, came ovah to ma house and sot on de bench side ma chile, and ma chile had a big slice o' bread all covah'd ovah wid lasses, den dat white trash chile took de bread away from ma chile an' lick all de lasses offen it and den she up an' call ma chile niggah. Den I jus' up an' swat dat white chile offen de bench, an' tole her to go home. Dat dar white trash chile knows dat dat am Gawd's truf an' she don't daiah say it ain't. Yo' jus' ax her if dat ain't de truf." (Turning to the child she had "swatted"), "ain't dat de truf you white trash chile?" No response. "You see yo'se'f, Jedge, what ah say am de truf. Now ah'd like to know if dis heah cou't goin' to allow such goins on an' say a niggah has no right to defen' her own chile. Ah don't ca' so much 'bout de lasses, Jedge, but when dat white trash chile lick all de lasses offen ma chile's bread, an' den call her niggah, I ax yo' opinion, Jedge, if dat ain't moah an' a niggah ought to stan'."

After awhile the court resumed judicial dignity enough to say, "prisoner discharged."

WEEKLY DIGEST.

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1. ACCIDENT INSURANCE—Warranties.—Where a bond indemnifying an employer from loss through an embezzlement or larceny of the employee was procured through misrepresentations by the employer material to the risk and made in response to a specific inquiry, the bond was void.—American Bonding & Trust Co. v. Burke, Colo., 85 Pac. Rep. 692.

2. ACTION—Conversion by Bailee. — Where a bailee lawfully obtains possession of the property of the bailor, a tort arising out of the breach of the bailor's duty may be waived by the bailor, and an action of assumpsit maintained —De Loach Mill Mfg. Co. v. Standard Sawmill Co., Ga., 54 S. E. Rep. 157.

3. ADJOINING LANDOWNERS—Light and Air.—An owner of land cannot enjoin adjoining owner from maintaining a fence of unusual height, on the sole ground that it deprived a building on the land of the former light and air from such adjoining land.—Koblegard v. Hale, W. Va., 58 S. E. Rep 793.

4. ALTERATION OF INSTRUMENTS — Burden of Proof. —In a claim against a decedent's estate, the burden held to be on claimant to explain an apparent material alteration in the note which was the basis of the claim. —*In re* Pinkerton's Estate, 99 N. Y. Supp. 492.

5. ANIMALS — Trespass.—The owner of cattle who herded them just outside another's pasture was not liable for their trespass after breaking through the fence, in the absence of anything tending to show that the cattle were breachy.—Moore v. Pierson, Tex., 98 S. W. Rep. 1007.

6. APPEAL AND ERROR—Authority to Correct Misprison of Clerk.—The superior court held authorized to correct a misprison of its clerk in entering an order on a motion for a new trial, though an appeal has been taken. —Pease v. Fink, Cal., 85 Pac. Rep. 657.

7. APPEAL AND ERROR—Losses Vis Major.—In the absence of a special provision in a building contract therefor, a loss by the blowing down of the building by a storm of unusual severity must be borne by the contractor.—Milske v. Steiner Mantel Co., Md., 63 Atl. Rep. 471.

8. ARBITRATION AND AWARD—Acceptance of Benefits. —A party to a common-law submission to arbitration cannot question an award published after he had made known to the arbitrators his election to withdraw from the arbitration, if he subsequently accepted the benefits of the award.—Harrell v. Terrell, Ga., 54 S. E. Rep. 116.

9. ARREST—Constables.—A constable by virtue of his office has common-law authority to arrest without a warrant for felony, breach of the peace, and some misdemeanors less than a felony committed in his view.—Martin v. Houck, N. Car., 54 S. E. Rep. 291.

10. ASSAULT AND BATTERY—Justification.—In an action for assault and battery, where defendant justifies on the ground that it was necessary to save his father from injury, a finding that the danger was not such as would induce a person exercising reasonable judgment to interfere held to justify a verdict for plaintiff.—Sloan v. Pierce, Kan., 85 Pac. Rep. 812.

11. ASSISTANCE, WRIT OF—When Allowed. — A purchaser on foreclosure may obtain a writ of assistance against one not a party to the foreclosure, but who claims possession under such a party, and whose right is subordinate to that of the purchaser.—Strong v. Smith, N. J., 63 Atl. Rep. 493.

12. ATTACHMENT—Funds of Benefit Society.—Money collected by a collector of an assessment insurance society and payable solely to the credit of the society's benefit fund held a trust fund, which was not subject to attachment in a suit by a creditor of the society.—Brenizer v. Supreme Council of Royal Arcanum, N. Car., 53 S. E. Rep. 835.

13. ATTACHMENT—Payment by Note.—Payment by a sheriff by note held sufficient, if payment by him is a prerequisite to his recovering of plaintiff in attachment the expense of preserving the attached property.—Southwestern Commercial Co. v. Owesney, Ariz., 85 Pac. Rep. 724.

14. ATTORNEY AND CLIENT—Change of Attorney.—A client is ordinarily entitled to change his attorney at his own volition by an order providing for payment or security of fees under Supreme Court Rule 10.—People v. Bank of Staten Island, 99 N. Y. Supp. 486.

15. ATTORNEY AND CLIENT—Disbarment.—Disbarment is a special proceeding and the statute must be followed so far as the steps to be taken are prescribed; otherwise it is to be conducted in accordance with the practice in civil cases.—*In re* Burnette, Kan., 85 Pac. Rep. 575.

16. ATTORNEY AND CLIENT—Fraudulent Dismissal of Action.—An attorney held not entitled to have an action which was dismissed by his client restored to the docket on the ground that it was dismissed to defraud him of his fees and disbursements.—De Wandelaer v. Sawdey, Conn., 63 Atl. Rep. 446.

17. BANKRUPTCY—Expenses in Management of Property.—A general assignee, continued in the management of the assignor's business after the latter's adjudication as a bankrupt until the appointment of a trustee, with the approval of the referee, is entitled to payment for his services during such time, and the proper expenses of the business should also be paid by the estate after the adjudication.—*In re* Pattee, U. S. D. C., D. Conn., 143 Fed. Rep. 994.

18. BANKRUPTCY — Liquidation of Claim. — Evidence considered, and held not to sustain the contention of a claimant that certain stocks owned by him were converted by the bankrupts, and his claim for the value of the stocks which remained in the bankrupts' hands liquidated.—*In re* Hurlbutt, Hatch & Co., U. S. C. C. of App., Second Circuit, 143 Fed. Rep. 958.

19. BANKRUPTCY — Order Authorizing Private Sale.— Where the time fixed in an order by a referee authorizing a private sale of the property of a bankrupt at a specified upset price had expired without a sale having been made, notice to creditors and others interested was essential before the making of a new order of sale.— Allgair v. William F. Fisher & Co., U. S. C. C. of App., Fifth Circuit, 143 Fed. Rep. 962.

20. BILLS AND NOTES—Effect of Delay in Presenting Check.—To prevent recovery on a check by a *bona fide* holder because of delay in forwarding or presenting it for payment, held the drawer must show the delay caused him to suffer loss.—Cox v. Citizens' State Bank, Kan., 85 Pac. Rep. 762.

21. BILLS AND NOTES—Payment of Forged Draft.—The presumption that the drawee knows the signature of the drawer of a draft is conclusive only where the party receiving the money has not contributed to the fraud.—B. B. Ford & Co. v. People's Bank of Orangeburg, S. Car., 54 S. E. Rep. 204.

22. BOUNDARIES—Navigable River.—If a private owner grant land, bounding it generally upon a river, the presumption that the grant will carry title as far as he owns is rebuttable, the question being purely one of intention, and when the intention is ascertainable from the record of a proceeding or the face of an instrument, other evidence is inadmissible.—Fowler v. Wood, Kan., 85 Pac. Rep. 763.

23. BROKERS—Commissions.—Where property is placed with a broker to sell, his commissions are earned when he finds a purchaser who offers to buy on the terms stipulated.—Indiana Fruit Co. v. Sandlin, Ga., 54 S. E. Rep. 65.

24. BRIBERY—Member of Board of Education.—Where the member of a board of education charged with the care of school buildings accepts money to influence his action in favor of letting a contract for cleaning school buildngs he is guilty of bribery under Gen. St. 1901, § 222. —State v. Campbell, Kan., 85 Pac. Rep. 784.

25. BROKERS—Sale of Realty.—Where one employs a real estate broker to find a buyer for land which he occupies, the broker's claim for compensation is not defeated by the fact that the wife refuses to execute a conveyance.—Staley v. Hufford, Kan., 85 Pac. Rep. 763.

26. CARRIERS—Automatic Elevator.—The operation of an automatic push-button electrical passenger elevator is not negligence which is actionable by any passenger, except a child of years so tender that he cannot know the danger.—Shellaberger v. Fisher, U. S. C. C. of App., Eighth Circuit, 143 Fed. Rep. 937.

27. CARRIERS—Discrimination Against Shipper.—In an action by a shipper to recover on account of discriminating overcharges held, that a carrier may not give a shipper a lower rate on logs than is given to another merely because the former ships the manufactured product over the carrier's line (Revisal 1905, § 3749).—Hilton Lumber Co. v. Atlantic Coast Line R. Co., N. Car., 53 S. E. Rep. 823.

28. CARRIERS—Injury to Goods.—A release of a carrier from liability for damages for the recited consideration of reduced rates held not shown to have been accepted by the shipper, and therefore to be ineffectual.—Hallparn v. Joy S. S. Co., 99 N. Y. Supp. 464.

29. CARRIERS—Injury to Licensee Assisting Passenger on Board.—Where one assists a passenger on a train at a station intending to leave the train, no duty arises to hold the train for a reasonable time unless knowledge of such purpose is communicated to the company's servants.—Seaboard Air Line Ry. v. Bradley, Ga., 54 S. E. Rep. 69.

30. CARRIERS—Platforms.—A carrier held not guilty of negligence because of the existence of a space between

the edge of a subway station platform and the cars, necessary to a safe passage of the cars along the platform.—Coogan v. Interborough Rapid Transit Co., 99 N. Y. Supp. 382.

31. CERTIORARI—Bond.—In a nonseverable cause of action, where two persons individually sue, and, after judgment against them, sue out a writ of *certiorari*, the bond should be signed by both. — Harwell v. Marshall, Ga., 54 S. E. Rep. 93.

32. COMPENSATION—Chaperone of Party on European Trip.—Chaperone of party on European trip held entitled to recover expenses incurred by her in exercise of her best judgment, but caused by acts of member of party.—Leonard's Adm'r v. Cowling, Ky., 93 S W. Rep. 909.

33. CONSTITUTIONAL LAW—Discrimination in Taxation.—The administration of valid tax laws will not amount to a denial of the equal protection of the laws, unless it appears that the officers charged with the collection of taxes intentionally discriminate. — Georgia R. & Banking Co. v. Wright, Ga , 54 S. E. Rep. 52.

34. CONSTITUTIONAL LAW—Statutes Providing for Actions for Personal Injuries.—Laws N. M. 1903, p. 52, ch. 33, § 2, relating to a wrongdoer compelling the person injured to litigate his case, held valid. — Buttron v. El Paso Northeastern Ry. Co., Tex., 93 S. W. Rep. 676.

35. CONSTITUTIONAL LAW—Taxation.—Const. Amend. 1900 (Laws Mo. 1899, p. 381), relating to bridge or road tax, but not applying to certain cities, held a violation of Const. U. S. Amend. 14, as denying to some persons within the state the equal protection of the laws.—State v. Chicago, B. & Q. R. Co., Mo , 93 S. W. Rep. 784.

36. CONTRACTS—Breach of One of the Conditions.—A breach of one of the conditions of a contract compromising certain actions held not to entitle plaintiff to a cancellation of the contract.—Haydon v. St. Louis & S. F. R. Co., Mo., 93 S. W. Rep. 833.

37. CONTRACTS—Consideration.—The owner of certain stock having executed an option under seal for the sale thereof expressing a consideration held estopped as against a *bona fide* assignee to deny that the option was based on a valuable consideration.—Watkins v. Robertson, Va., 54 S. E. Rep. 33.

38. CONTRACTS—Failure to Pay Installment. — A positive refusal by one for whom a launch was being built to pay an installment according to the terms of the contract, unless the builders would give him a security they were under no obligation to give, relieved them from further performances on their part.—Michigan Yacht & Power Co. v. Busch, U. S. C. C. of App., Sixth Circuit, 142 Fed. Rep. 929.

39. CONTRACTS—Foreign Corporations.—Acceptance by foreign corporation of note payable in this state held not doing business within the state, within statute relating to permits therefor.—Norton v. W. H. Thomas & Sons Co., Tex., 93 S. W. Rep. 711.

40. CORPORATIONS—Action by Stockholders. — In an action by a stockholder against directors to recover sums claimed to be due the corporation, the complaint held to state a cause of action.—Young v. Equitable Life Assur. Soc., 99 N. Y. Supp. 446.

41. CORPORATIONS—Liability of Stockholders.—The liability of a corporation as an assignee of a lease stipulating for rent payable quarterly in advance is a contingent liability, which only ripens into a debt as the rent falls due within the statutes making stockholders liable for corporate debts.—Sanford v. Rhoads, 99 N. Y. Supp. 407.

42. CORPORATIONS—Revocation of Dividend.—Corporation, having declared a cash dividend, held not entitled to defeat payment thereof by levying an assessment on the stock payable on the same day as the dividend declared.—McLaren v. Crescent Planing Mill Co., Mo., 93 S. W. Rep. 819.

43. CORPORATIONS—Subscription Liability.—The creditor of a corporation held not able to exact from shareholders a sum in excess of that agreed on as the amount to be paid on subscriptions, though less than par.—Miller v. Higginbotham's Adm'r, Ky., 93 S. W. Rep. 655.

44. COUNTIES—Authority of Commissioners to Build Hospital.—A statute conferring on county commissioners the power to build detention hospitals for their respective counties confers on the boards the power to acquire by purchase sites for such hospitals.—Yegen v. Board of Com'rs of Yellowstone County, Mont., 85 Pac. Rep. 740.

45. COURTS—Foreign Insurance Company.—The courts of a state have no power to control the supreme council of a foreign assessment insurance society by *mandamus* or injunction.—Brenizer v. Supreme Council of Royal Arcanum, N. Car., 53 S. E. Rep. 835.

46. CRIMINAL EVIDENCE—Contradictory Statements.—It was error to admit in evidence statements of a witness made in the absence of defendant, that he knew that defendant was guilty, though the witness was thereafter sworn in behalf of defendant.—Bishop v. State, Ga., 53 S. E. Rep. 807.

47. CRIMINAL EVIDENCE—Photographs.—A photograph duly identified and admitted in evidence as a correct representation of the appearance of a building at the time the photograph was taken may properly be inspected with a magnifying glass.—State v. Wallace, Conn., 63 Atl. Rep. 448.

48. CRIMINAL EVIDENCE—Remarks of Third Persons.—Before the sayings of a third person in the presence of one subsequently charged with the crime should be admitted in evidence, it should be affirmatively shown that the circumstances required an answer or denial before silence will amount to an implied admission. — Lumpkin v. State, Ga., 53 S. E. Rep. 810.

49. CRIMINAL TRIAL—Accomplice.—Neither the joinder of a witness in an indictment with the defendant, nor a plea of guilty entered by the witness, necessarily makes him an accomplice with defendant, so as to require corroboration of his testimony on the latter's trial.—Hargrove v. State, Ga., 54 S. E. Rep. 164.

50. CRIMINAL TRIAL—Challenge of Juror. — Ineligibility of a juror because of service in the same court during the next preceding term held good ground for challenge, but not cause for new trial.—Jackson v. State, Ga., 54 S. E. Rep. 167.

51. CRIMINAL TRIAL — Conviction Under Labor Contract Act.—To sustain a conviction under the labor contract act of August 15, 1903 (Acts 1903, p. 90), it must appear that the accused contracted to perform the labor himself, and has without good cause failed and refused to carry out his contract.—Johnson v. State, Ga., 54 S. E. Rep. 184.

52. CRIMINAL TRIAL—Error in Minutes. — Omission in entering oral sentence in minutes could at a subsequent term, upon a direct proceeding, be cured, and the sentence and minutes of the court amended so as to carry into effect the oral pronouncement of sentence.—Tyler v. State, Ga., 53 S. E. Rep. 818.

53. CRIMINAL TRIAL—Evidence.—Though an indictment be returned "not true" as to one of two defendants, evidence competent against both of them may be used against the other one.—State v. Martin, N. Car., 53 S. E. Rep. 874.

54. CRIMINAL TRIAL—Former Jeopardy.—Where, after a jury had been impaneled, it was set aside because a juror was disqualified, a plea of former jeopardy after another jury had been impaneled held properly stricken.—Armor v. State, Ga., 53 S. E. Rep. 815.

55. CRIMINAL TRIAL—Homicide.—Where defendant introduced his wife as an eyewitness to a homicide, but did not examine her as to facts within her knowledge, it was proper for the prosecuting attorney to refer to such fact in his arguments.—McMichael v. State, Tex., 93 S. W. Rep. 723.

56. CRIMINAL TRIAL — Instruction as to Considering Withdrawn Testimony.—Where testimony is withdrawn

by the court, which states to the jury that whatever testimony is ruled out they are not to consider, it is not error to deny an instruction to disregard such testimony.—State v. Roupetz, Kan., 85 Pac. Rep. 778.

57. CRIMINAL TRIAL — Procedure. — Though the presiding judge at first instructed counsel that they must read the law to the court, yet where he afterwards told one of them to proceed with the reading, and the decision under discussion was in fact read to the jury, it will not require a reversal.—Young v. State, Ga., 54 S. E. Rep. 82.

58. CUSTOMS AND USAGES—Exclusion by Terms of Contract.—A custom of trade does not, by implication, become a part of a written contract where there is an express provision in the writing denying the right claimed under the custom.—Vardeman v. Penn. Mut. Life Ins. Co., Ga., 54 S. E. Rep. 66.

59. DEATH—Persons Entitled to Damages. — That a father had been divorced from the mother of the children, who were placed in the mother's custody by the court, and that the father from that time had not contributed to the support of the children, did not deprive them of the right to damages for his death.—Taylor v. San Antonio Gas & Electric Co., Tex., 93 S. W. Rep. 674.

60. DEEDS—Ratification.—Plaintiff, suing to set aside a deed, held not required to repay any money or give an indemnity bond. — R mine v. Howard, Tex., 93 S. W. Rep. 690.

61. DEEDS—Undue Influence.—Old age and physical infirmity of a grantor together with the fact that he conveyed the whole of his estate to his wife and one daughter, on whom he was dependent for personal care, raises no legal presumption of undue influence. — Teter v. Teter, W. Va., 53 S. E Rep. 779.

62. DIVORCE—Fraudulent Conveyance. — A voluntary conveyance by a man under engagement to marry, with intent to free the land of the marital rights of the wife, held void as to her dower rights, and as to alimony decreed against him in a suit for divorce.—Goff v. Goff, W. Va., 53 S. E. Rep. 769.

63. EASEMENT—Partition.—On partition between heirs each heir takes his share subject to any apparent permanent and reasonably necessary *quasi* easement which existed thereon for the benefit of another part of such real estate at the death of the ancestor.—Johnson v. Gould, W. Va., 53 S. E. Rep. 798.

64. EJECTMENT—Recovery for Improvements.—Under the statute, any occupant making improvements without actual knowledge that his title was imperfect, unless his ignorance was due to inexcusable neglect, held entitled to recover therefor.—Gallenkamp v. Westmeyer, Mo., 93 S. W. Rep 816

65. ELECTRICITY — Negligence. — Electric light company and telephone company held properly joined as defendants in action for injuries to telephone lineman from electric light wires.—East Tennessee Telephone Co. v. Carmine, Ky., 93 S. W. Rep. 903.

66. EMBEZZLEMENT — Restoration of Funds. — In a prosecution for embezzlement, it was not error to refuse to permit defendant to prove that he was willing to deposit the sum alleged to have been embezzled in the clerk's office to await the termination of a civil litigation.—State v. Summers, N. Car., 53 S. E. Rep. 856.

67. EMINENT DOMAIN—Railroad Grade Injury to Abutting Property. — When a railway company locates its line along a public street, and changes the grade, it is liable to the owner of abutting property for any actual damages resulting therefrom.—Atlantic & B. Ry. Co. v. McKnight, Ga., 54 S. E. Rep. 148.

68. EQUITY—Petition.—Where a petition for equitable relief fails to state that plaintiff has no adequate remedy at law, or that he has a choice of remedies, advantage may be taken of the omission by the adverse party during the trial by objecting to the evidence. — Haydon v. St. Louis & S. F. R. Co., Mo., 93 S. W. Rep. 833.

69. EVIDENCE—Judicial Notice.—The courts of this state will take judicial notice that the mass of property in this state is made up of lands and the different forms of personalty, but such notice cannot be taken as to the quantity of personalty.—Georgia R. & Banking Co. v. Wright, Ga., 54 S. E. Rep. 52.

70. EVIDENCE—Political Subdivisions of State.—A state court will take judicial notice of the political subdivisions of the state, the boundary lines of counties the location of rivers fixed by statute, and the geographical position of cities and towns.—State v. Southern Ry. Co., N. Car., 54 S. E. Rep. 294.

71. EVIDENCE—Statements Made Before Marriage with Accused.—Statements by one present at the time of a homicide held inadmissible against defendant, though after the homicide, and before the trial, she became defendant's wife.—McMichael v. State, Tex., 93 S. W. Rep. 723.

72. EXECUTION—Conversion of Property Levied on.—The common law authorizes a sheriff to maintain an action against one who unlawfully takes from his possession property levied on under lawful process.—Dickinson v. Oliver, 99 N. Y. Supp. 432.

73 EXECUTORS AND ADMINISTRATORS — Carrying on Business of Decedent.—In the absence of a testamentary direction, if an administrator carries on the business of his decedent, he will be individually bound for the contracts of the business.—Campbell v. Faxon, Horton & Gallagher, Kan., 85 Pac. Rep. 760.

74. FEDERAL COURTS—Effect of State Statute.—A state statute requiring a payment or tender of the amount justly due to a purchaser of property at tax sale as a condition precedent to the maintenance of a suit to recover the property is not controlling on a federal court of equity.—Klenk v. Byrne, U. S. C. C., W. D. Wash., 148 Fed. Rep. 1008.

75. FIRE INSURANCE—Declarations of Agents.—Where mutual insurance charter provides that there shall be no contract until application is accepted, declarations of soliciting agent that insurance begins from payment of premium held incompetent. — McGrath v. Piedmont Mut. Ins. Co., S. Car., 54 S. E. Rep. 218.

76. FIRE INSURANCE—Fraudulent Statements in Proofs of Loss.—The adoption by a wife of a fraudulent statement by her husband in making proofs of loss in a fire policy covering her property held not fraud on her part. —Virginia Fire & Marine Ins. Co. v. Hogue, Va., 54 S. E. Rep. 8.

77. FRAUDS, STATUTE OF—Promise to Pay Debt of Another.—A written promise to pay the debt of another must, either itself or in connection with other writings, identify the debt which is the subject of the promise, without the aid of parol evidence.—M. C. Pearce & Co. v. R. T. Stone Tobacco Co., Ga., 54 S. E. Rep. 103.

78. FRAUDS, STATUTE OF—Sale of Land. — Where a mortgage is foreclosed by advertisement and the printed advertisement does not bear after the sale any note or memorandum signed by the mortgagee or his agent, the advertisement alone is insufficient to take the case out of the statute of frauds.—Dickerson v. Simmons, N. Car., 53 S. E. Rep. 850.

79. FRAUDULENT CONVEYANCES—Payment of Note to Protect Maker from Suit.—A conveyance by the maker of a note in payment thereof held not fraudulent as to the maker's creditors, though the person to whom the conveyance was made had acquired the note to protect the maker from suit on it.—Riske v. Rotan Grocery Co., Tex., 93 S. W. Rep. 708.

80. GARNISHMENT—Exemptions.—One who owes wages exempt from garnishment, on being garnished, if he permits judgment to be rendered against himself and pays the money due into court, will be liable in a suit by the laborer for the wages due.—Southern Ry. Co. v. Fulford, Ga., 54 S. E. Rep. 68.

81. GUARDIAN AND WARD—Use of Property.—If a guardian uses the ward's estate in his own business, or mingles the ward's money with his own, he must account for at least legal interest, unless he made a greater profit.—Goff's Guardian v. Goff, Ky., 93 S. W. Rep. 625.

82. HABEAS CORPUS—Violation of Ordinances.—Where a sentence of one under a city ordinance was lawful, and a requirement on failure to pay a fine to work on the public works or the street was authorized by law, defendant so sentenced was not entitled to discharge on *habeas corpus*.—Lyons v. Collier, Ga., 54 S. E. Rep. 183.

83. HOMICIDE—Cooling Time.—Where there was an exchange of abusive words resulting in the drawing of a knife by the deceased, and after two hours a fatal encounter ensued, it was proper to charge on voluntary manslaughter.—Williams v. State, Ga., 54 S. E. Rep. 106.

84. HOMICIDE—Failure to Provide Necessities of Life.—Where a husband neglects to provide necessaries for his wife or medical attention, and she dies, he will be guilty of involuntary manslaughter, if she was unable to appeal to others for aid and the death was the natural consequence of the neglect.—Westrup v. Commonwealth, Ky., 93 S. W. Rep. 646.

85. HOMICIDE—Justification. — Though opprobrious language may justify a simple assault, it will not justify an attack with a deadly weapon in a manner likely to produce death.—Mathews v. State, Ga., 54 S. E. Rep. 196.

86. INCEST—Stepchild.—A man who marries the mother of an illegitimate daughter becomes the stepfather of such child within the meaning of Pen. Code 1895, § 380, and Civ. Code 1895, § 2118, defining incest. — Lipham v. State, Ga., 53 S. E. Rep. 817.

87. INJUNCTION—Criminal Prosecutions.—Equity will not enjoin the institution of prosecutions for violations of penal municipal ordinances, nor inquire into validity of ordinances.—Salter v. City of Columbus, Ga., 54 S. E. Rep. 74.

88. INSANE PERSONS—Foreclosure of Mortgage.—A lunatic whose property has been sold under foreclosure, wherein his guardian was duly served, cannot redeem said property from sale under foreclosure after his restoration to sanity on the ground that the court did not acquire jurisdiction.—Foran v. Healy, Kan., 85 Pac. Rep. 751.

89. INTOXICATING LIQUORS—Illegal Sale.—A conviction for violation of the local option law cannot be sustained on evidence showing a sale in a county different from that charged.—Wolf v. State, Tex., 93 S. W. Rep. 742.

90. JUDGMENT—Motion to Vacate.—To justify the granting of a motion to set aside a default, defendant must show that he proceeded with diligence; that his default arose from excusable neglect; that the judgment will affect him injuriously; and that he has a defense.—Bowen v. Webb, Mont., 85 Pac. Rep. 739.

91. LANDLORD AND TENANT — Defective Elevator.—A tenant of a portion of a building held not liable to one of its servants, injured because of the defective fastening of the gate of an elevator used jointly by all of the tenants.—Andrus v. Bradley-Alderson Co., Mo., 93 S. W. Rep. 872.

92. LANDLORD AND TENANT—Distraining for Rent.—When a lease embraces a sum to be paid for rent for land, and another is hire for animals to be used, the whole sum due is rent, and may be collected by distress.—Sapp v. Elkins, Ga., 54 S. E. Rep. 98.

93. LANDLORD AND TENANT—Estoppel to Deny Title.—Where one in possession agrees to pay another rent, he will be estopped from setting up title in himself adverse to such other until he shall have surrendered possession.—Bullard v. Hudson, Ga., 54 S. E. Rep. 132.

94. LANDLORD AND TENANT—Lease.—Where leased premises are described as "the lands near M., Georgia, known as the 'C. S. J. place,'" the lessee is entitled not only to the use of the land for cultivation, but to the fruit on the rented premises maturing during the lease.—Quiggle v. Vining, Ga., 54 S. E. Rep. 74.

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116. NEGLIGENCE—Excavation to the Damage of Adjoining Owner.—A landowner held not liable for damages to the land of an adjoining owner because of excavation work on the former's premises.—Schulhofer v. Mulhare, 99 N. Y. Supp. 489.

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124. PROCESS—Service.—A resident of the state while in attendance on a federal court in a county other than that of his residence, either as a party or witness, is exempt from service of summons in an action in that county.—Underwood v. Fosha, Kan., 85 Pac. Rep. 564.

125. PROCESS—Service of Summons.—Wherere service of summons is irregular and a motion to quash and vacate the same has been made, overruled and exceptions saved, the point is not waived by the defendant afterward pleading to the merits of the case.—Bes Line Const. Co. v. Schmidt, Okla., 85 Pac. Rep. 711.

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128. RAILROADS—Drinking Water for Passengers.—It is within the power of the general assembly to impose on a railway company the duty of providing pure drinking water for its passengers while on the cars, and for indictment, prosecution and fine for neglect of such duty.—Southern Ry. Co. v. State, Ga., 54 S. E. Rep. 160.

129. RAILROADS—Duty Toward Licensee on Track.—A railway company owes no duty of provision to employ competent servants to operate its trains, or to run them in a particular manner or at a particular rate of speed, as to a bare licensee on its track.—Norfolk & W. Ry. Co. v. Stegall's Adm'x, Va., 54 S. E. Rep. 19.

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131. RAILROADS—Stop, Look and Listen.—A traveler approaching a railroad crossing must not only look and listen for the approach of trains before he goes on the track, but must continue to look and listen until he has passed the point of danger.—Choctaw, O. & G. R. Co. v. Baskins, Ark., 98 S. W. Rep. 757.

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134. SALES—Breach and Measure of Damages.—In an action for breach by seller of contract of sale of scrap iron, measure of damages held difference between market price at time of refusal of seller to deliver and the contract price.—United Rys. & Electric Co. of Baltimore v. H. Wehr & Co., Md., 63 Atl. Rep. 475.

135. SALES—Contract by Wire.—Where one dealer solicits another to make an offer for certain produce, and the latter wires an offer and the former telegraphs that he will sell on the terms of the offer, a contract of purchase and sale is made.—Bennett v. Cummings, Kan., 85 Pac. Rep. 755.

136. SALES—Delivery to Carrier.—Delivery of certain rings by defendant to a responsible public carrier for transportation to plaintiff, held a delivery to plaintiff, absolving defendant from liability for loss of the rings by the carrier.—Gottlieb v. Rinaldo, Ark., 93 S. W. Rep. 750.

137. SALES—Resale After Buyer Refused to Accept.—Resale of flour after the buyer had refused to accept the same, held made in good faith, with due diligence and within a reasonable time, and therefore fixed the seller's measure of damages.—Ford v. Erde, 99 N. Y. Supp. 487.

138. SALES—Transfer of Title.—A buyer to whom the goods have been delivered, held the owner thereof, and the seller having possession for a day confers no title by a sale to a third person having knowledge of the facts.—Montant v. Johnson, 99 N. Y. Supp. 395.

139. SEQUESTRATION—Instructions.—In a sequestration suit, if plaintiff fails to recover the property sued for, defendant is entitled to a judgment restoring the same to his possession, or for its value if the same cannot be returned.—Rea v. Schow & Bros., Tex., 93 S. W. Rep. 706.

140. SHERIFFS AND CONSTABLES—False Imprisonment.—In an action on the bond of a police officer for a false arrest and for an assault and battery, only compensatory damages could be recovered.—Scott v. Commonwealth, Ky., 93 S. W. Rep. 668.

141. SHIPPING—Injury to Stevedore.—An injury to a stevedore by a bucket of stone which fell on him while in the hold helping to discharge a barge, held due solely to the negligence of the winchman, who was furnished by the vessel, which rendered it liable for the injury.—The City of San Antonio, U. S. C. C. of App., Fourth Circuit, 143 Fed. Rep. 955.

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